THE
MADRAS LAW JOURNAL

II] NOVEMBER [1937

OUR COLLECTIVE RESPONSIBILITIES.*

Even on a festive occasion like this when we have gathered to have a little relaxation and to cultivate social contacts between different members or groups of members of the Bar, it is not inappropriate and is in fact in accordance with our tradition if we devote a little time to think about some of our common problems. I have therefore taken the liberty of addressing you on some of our collective responsibilities which to my mind require the urgent and serious attention of the Bar through its various organisations. Two matters that I propose to deal with arise out of the working of our judicial system in relation to the large bulk of our litigants and the third though an internal problem of the Bar concerns its efficiency and is therefore a matter of public importance.

As regards the first two problems the point of view that I desire to stress is that of the large bulk of our litigants who are very poor and often helpless. It seems to me that the time has arrived when this point of view would be particularly insistent and demand greater attention and indeed satisfaction than it has received in the past. The removal of any serious abuses or hardships which the poor litigant can reasonably complain of in our legal institutions is likely to engage the immediate attention of the Government, the Judiciary and the Bar. The extension of the franchise by the addition of nearly five million voters in this province has naturally resulted in the transfer of political power to a large section of people consisting of the lower middle and poorer classes whose representatives occupy seats in the Assembly which till now consisted mostly of members drawn from the richer and upper middle

* Paper read by Mr. S. Ramaswamy Iyer, Advocate, Madras, at the Advocates' gathering held on 8th August at Woodlands, Royapettah, Madras.

classes. The representatives of classes of our population which supply most of the litigants for our Courts are therefore likely to exhibit great impatience with features in our legal system which unduly disregard their interests and would naturally refuse to wait for reforms till lawyers and judges drawn from the more well-to-do classes find time and inclination to attend to them. Even in England it has been till recent years a reproach against lawyers and judges that they have allowed grave abuses in the legal system to continue if indeed they had not blocked reform. The eighteenth century and the first quarter of the nineteenth were periods of stagnancy and the first powerful drive for legal reform began just about the time of a great democratic advance made by the Reform Act of 1832. During the thirty years from 1830 to 1860 many conspicuous improvements in law were effected and it is a curious coincidence that another great extension of the franchise made by the Reform Act of 1867 synchronised with a move for the long overdue reform of the Judicatures which finally resulted in the passing of the famous Judicature Acts in 1873. It must however be mentioned that whatever was the case in the past the Bar and the Bench in England have been very active in the cause of law reform during the last few years. The appointment in 1934 of a Law Revision Committee by Lord Sankey, then Lord Chancellor, has led to legislation removing several age-long defects and anomalies in the realm of substantive law and to a continual examination of several other defects in different branches of the law. Besides there have been other Committees like the Business of the Courts Committee whose reports have led to changes in procedure. In the United States also the last decade and a half has been a period of great legal activity. The American Law Institute which is an entirely non-official association of lawyers, judges and professors has been carrying out an ambitious and arduous programme of issuing Restatements of the law in several branches. Besides its members have been engaged in the study of various problems of judicial procedure from the point of view of ameliorating the lot of litigants and witnesses and making justice effective and cheap. Here in India our problems are peculiar and different but are perhaps more urgent and insistent for a solution. The Bar has now therefore a great opportunity as well as a responsibility in helping to bring about

a proper solution but it is essential to bear in mind that the Bar has to make certain re-adjustments in its general outlook in response to present conditions and pay due heed to its own place in the social polity and its obligations for social service and not merely to its rights and emoluments. This method of approach to our problems will make great demands on us for impartiality, disinterestedness, and self-examination and unless those demands are fairly met it seems to me that the influence and position of the Bar and indeed even its existence may be in jeopardy in the future. Let us remember that great social experiments are in progress elsewhere which do not have any place for a professional Bar in their scheme of administering justice.

The first question concerns the allied subjects of excessive cost and delay. I shall here confine my remarks to civil litigation as the second problem to be noticed below will have a special application to litigants in Criminal Courts. Before this audience it is not necessary to take up time in arguing for the urgent need for reduction of court-fees. Especially in money claims the scale of fees is prohibitive and in fact outrageous in view of the high purchasing power of the rupee in terms of goods and especially agricultural produce. The result has been as recently reported by the Collectors of several districts that stamp revenue has fallen and litigants give up resort to the Civil Courts. As our villages are rarely free from factions and our people are often illiterate and easily misled, we cannot assume that avoidance of litigation necessarily indicates a fair adjustment of disputes outside Court and that a good many just claims are not abandoned. It seems to me that our Bar Associations and the Bar Council have to take up this matter with the authorities and press upon them the urgent need for a revision of court-fees. Besides this item of expense there are many others which make civil litigation far too costly and risky for the average litigant and I would suggest that some of our mofussil Bar Associations should undertake in some selected areas an enquiry as to the actual cost incurred by parties in different types of civil litigation, the factors that contribute to the cost and any other facts bearing on this question. An enquiry of this kind may also be useful by way of disclosing other abuses in our judicial system. As regards the expense in the appellate Courts, there are two

items which call for comment. First, it appears unfair to call on a party to pay the same court-fee as in a suit or any court-fee at all for every appeal that he has to prefer. Thus if a plaintiff sues for recovery of a sum of Rs. 1,000, he pays a court-fee of Rs. 112 and odd in the suit. If he fails, he has to pay a like amount for an appeal in the District Court and again a like amount for a second appeal in the High Court. In these three Courts, he pays nearly a third and if he has to go up on a L.P. Appeal he pays altogether nearly half the amount sued for. If he succeeds finally his success may often be illusory and may not enable him to recover his expenses from the other side who may be too poor or too troublesome and may evade payment. In our procedure a second appeal is practically on leave of a Judge of the High Court who admits it after a careful examination of the material papers and almost always after hearing arguments. There is no justice in calling upon an appellant to pay a court-fee in a case where he has already paid it in one or both the lower Courts and is obliged to appeal from a judgment which in the opinion of a Judge of the High Court is *prima facie* erroneous in law. Similar considerations apply to court-fees in L. P. Appeals. The second item of expense which calls for revision is printing. The rule, which requires every appellant in the District Courts to file printed copies of the judgment or order appealed against, was made long ago but as type-writing has since become quite efficient and cheap there seems to be no reason for putting parties to the heavy expense of printing. The Courts may themselves issue type-written copies of judgments in plain foolscap with lines numbered for the use of the appellate Courts and charge moderately for such copies. The same course may, it seems to me, be adopted without any great inconvenience or disadvantage in the case of second appeals. An appellant in a second appeal has now to buy six printed copies of judgments of both Courts. If he has been also appellant in the District Court he would have already paid for the printing of the first Court's judgment but he has to do it over again. If he buys these printed copies and takes them to his Madras lawyer who may tell him, as is not unoften the case, that there is no appealable point of law, he has paid for all this printing in vain and the spectacle of the poor ryot who is fighting for a piece of land and has perhaps not even the bare necessaries of life going back disappointed

with only his bundle of printed copies left to him is not unusual and cannot fail to rouse sympathy. Besides, it is high time that printing of pleadings and documents is dispensed with for the smaller type of work in the High Court including second appeals and miscellaneous cases. The parties may be required to file the necessary papers in a clean and well-typed form. The case of first appeals is different as the stakes are larger and the High Court has to decide on the facts. Even in such cases some of the High Courts seem to require only typed papers. I suggest that our Association should ask for a modification of the rules about printing and press on the High Court the need for generally scaling down the cost of appeals. Though the heavy cost of suits and appeals is also a matter of complaint in England the problem is of a very different type in this country, where even the highest Courts of appeal are concerned with a large proportion of small and petty work and the bigger type of litigation which comes up in a rich and industrial country is practically absent. The only other matter under this head is delay. Excessive delay is as ruinous to the litigant as excessive cost and the position in our High Court seems to call for early attention. At present the position is that parties in a first appeal have to wait for about seven years and those in a second appeal four years for their cases to be heard. In many cases parties do not survive to get a decision for which they had incurred great expense and trouble. In many others their financial condition is hopelessly altered for the worse and they are unable to conduct their cases. Even cases of first appeals being struck off for non-prosecution are now-a-days by no means rare and behind common place legal incidents like 'counsel reporting no instructions' or 'an appeal abating' may lurk silent tragedies by way of families having been ruined by delay in obtaining their legal rights or dues or their members having famished and died owing to such reasons. The state of affairs is nothing short of a grave public evil and it is surprising that the authorities have allowed matters to drift to this condition. If I may speak with all humility on a subject of some delicacy and difficulty, the only remedy appears to be to appoint as many judges as would be required to clear the arrears in the course of six months or a year and to leave the work in a condition in which an appeal will normally be heard under 12 months and a second appeal under six. This was the period of pend-

ency of such cases several years ago and no reason or consideration ought to stand in the way of affording this essential relief to our litigants As the maximum strength of this High Court has been fixed at 16 by an Order in Council, a fresh Order in Council would have to be sought as a temporary measure on account of the grave state of emergency prevailing in the highest Court in this province. The real difficulty has been the question of cost but I would like to make the suggestion that prominent men in the Bar should in view of the great interests involved be invited to do the work in an honorary capacity for a short period of six to twelve months. In England retired judges are often requested to render such service and men of great age like the late Justices Avory and Darling have responded to the call of public duty. Besides on occasions when owing to illness or other emergencies there is a dearth of judges to do the work on circuit, it is the practice to employ King's Counsel in London or in the circuit itself as *ad hoc* Commissioners of Assize to clear the lists of pending cases. The report of the Royal Commission on the Despatch of Business at Common Law states that this practice is by no means unusual though it involves inconvenience and hardship to the King's Counsel selected. I refuse to believe that our Bar will not respond to the call of duty if an invitation is extended to it. In the course of twelve months the work of the High Court can be reduced to normal proportions and the permanent strength can then be adjusted to the size of such work. I have ventured to make these suggestions as the state of the work in the High Court is a matter of common talk in the legal world and all the strenuous efforts made by our judges so far to cope with the work have failed for no fault of theirs. I am aware that remedies which look simple to persons outside the seats of authority may not strike those inside in the same light, but it would be interesting to know whether any other course can be suggested short of allowing matters to drift as they have done, I would respectfully request the Bar Council and our Association to consider this matter seriously.

The second problem is one of considerable importance to the fair name of the judicial system of which the Bar is an integral part. I think the time has come when the Bar itself has to undertake an examination of the extent to which our Courts and their procedure lend themselves to abuse and the

prevalence of undesirable litigation. One cannot help feeling that there is a great deal of scope and facility at the present day for false claims, charges and defences in our Civil and Criminal Courts. The administration of criminal justice and the investigation of crime are also not infrequently attended with oppression in various forms and by various agencies. It is not for instance an uncommon event for a petty quarrel in a village being magnified by local partisans and a big and wasting criminal case resulting from it. An event of this kind often brings devastation and ruin to many families while it fills the pockets of a few others in the village and outside. It is accompanied by one or more of many evils such as victimization, blackmail, suborned evidence,—evils which are said to have been rampant in mediæval England. But we must recognise that our economic and social polity is still in many parts mediæval. In many of our villages there are numbers of wholly or partially unemployed and idle people who find it profitable to promote quarrels. The existence of caste groups which on account of their exclusiveness imperfectly react to the needs of one another and the prevalence of factions are also contributory factors. But these explanations will not go the whole way and the part played by the component elements of our judicial system, namely, the Bar, the Magistracy, the Jury and the Police in allowing such abuses to exist requires careful and impartial examination. I would respectfully suggest that the Bar Council may invite some Mofussil Bar Associations to undertake with the co-operation of local judicial officers an enquiry into (*a*) cases where the evils of the kind abovementioned come to their notice; (*b*) the actual cost incurred by parties in some typical cases in the criminal Courts. The enquiry is likely to be difficult as the veil of secrecy may be hard to lift in respect of many of such matters. But lawyers with local knowledge and experience may be able to overcome the difficulty if they proceed in a spirit of earnest inquiry. In this matter we have the fine example of the Harvard Law School which has been conducting an investigation of this kind. One of the reports issued on a survey of crime and criminal justice in Boston discusses several defects in the administration and makes suggestions for making justice more swift, sure and cheap. Some of the suggestions cover a wide field such as imposing restrictions on

admission to the Bar, control by Courts over lawyers' fees, improvement of the quality of juries, etc.

The third and last subject I would like to briefly notice relates to certain matters which would ensure the continued efficiency of our Bar. The first of them is the assumption by our Bar Council of its statutory power to impart and control legal education and examination. As the Bar Council has already decided to do so and to ask for the sanction of the High Court, I need not take up your time by speaking about the need for its doing so. The assumption of this important responsibility and satisfactory discharge of it by the representatives of our Bar acting in co-operation with the Bench will not merely ensure the efficiency of the entrants to our profession,—which is a very vital matter—but also enhance the prestige and reputation of the Bar in our province. There are two outstanding advantages in the proposal of the Bar Council. First it can coach up students in a number of essential subjects not now taught to them by spreading the course of studies over three years including the year of apprenticeship. Secondly it has ample material in our Bar for a large and able teaching and examining staff and the opportunity so provided to them of working under the direction of senior members of the Bar and members of the Bench will be of the greatest service to them and to the Bar as a whole. But our efficiency depends on other factors as well. In our Bar it was preserved by a noble tradition of leaders encouraging forensic talent in younger men and enabling them to make their mark in the profession. In fact there have been eminent men who would go out of their way to find out or discover talent from outside their own immediate circle of relations or juniors. In that way a succession of able lawyers who ultimately occupied the topranks was ensured. It seems to me that this tradition needs preservation in the highest interests of our Bar both in the City and in Mofussil centres. As in recent years the Bar has had a great accession of strength from different communities, assistance in the above form to deserving men also of other communities than one's own will promote brotherly feeling and communal harmony in the Bar and indeed also outside it. Gentlemen, I have done and I hope and trust that our Bar would safeguard its internal position as well as secure and justify its rightful place in our social structure.

SUMMARY OF ENGLISH CASES.

DROWN *v.* GAUMONT-BRITISH PICTURE CORPORATION, LIMITED, (1937) 1 Ch. 402.

Company—Shares—Sale of at premium—Reserve fund partly made up of the premium on the shares—Dividend if can be paid therefrom.

From time to time during the company's history shares were issued at a premium and the premium was from time to time carried to reserve. There existed a balance carried to reserve of £5,00,000. Part of it was made up of these premiums. In respect of the financial year ending March 31, 1937, the company proposed to pay a dividend which could not be paid without utilising a part of this reserve. A shareholder, on behalf of all the other shareholders also, moved the Court for an injunction restraining the company from paying it from so much of the reserve as represented the premiums, contending that it was capital and not profits of the company.

Held, that subject to anything in the articles of association to the contrary, there is nothing legally wrong in a company dividing among its shareholders a premium obtained on the issue of shares. The premium from its very nature is not part of the capital paid up on the shares; it is the surplus of the sum received in respect of the share over the amount required to pay up the share to the extent to which it is treated by the company as paid up. Therefore the principle that capital paid up on the share must not be divided is in no way infringed by distributing the premium in dividend.

In re WATERHOUSE'S POLICY, (1937) 1 Ch. 415.

Stamp Act, 1891, *S.* 88—*Insurance policy—Mortgage of—Mortgage stamped on* £500—*Claim under policy more than* £500—*Security debt also more than* £500—*Mortgagee claiming to be paid* £500—*If insurance company liable to pay—Failure by company to pay on demand on a* bona fide *mistake—Payment into Court—If company liable to pay interest.*

In May, 1926, Mr. S. H. W. deposited with a bank a life insurance policy effected on his life with the Law Life Assurance Society, which society was subsequently in 1910 taken over by P. Assurance Company. This was deposited by way of an equitable mortgage to secure moneys then due and thereafter to become due with the Bank. By a mortgage dated 1928 W. assigned the policy to the Bank to secure the balance that may be owing by him from time to time to the Bank on current or any other account. Notice of this was given to the P. Co. The amount then due to the Bank was £596 and odd. The deed was stamped with a stamp sufficient

to cover £500, the face value of the policy. On 13th August, 1936, the policy became payable and with bonuses, etc., it amounted to £963. The sum payable to the Bank on that date was £619 and odd. On 4th August the Bank sent to the P. Company the policy and the mortgage deed. The company refused to pay the amount unless the mortgage was impressed with an additional stamp. The bank insisted that £500 may be paid to it and the balance to Mr. S. H. W.

Held, that the effect of sub-S. (2) of S. 88 of the Stamp Act, 1891, is this, namely, that "where the total amount is unlimited, as for instance in this case where the Bank permits one of its clients to overdraw his account and there is no fixed limit placed upon the amount allowed in overdraft, or where there is a security for a limited sum, and an overdraft is allowed beyond that sum, there is no necessity to stamp the security for any amount greater than the amount for which the Bank rely upon it as security for the loan. Therefore the P. Company was bound to have paid the £500 claimed by the Bank.

The company took *bona fide* a different view of the construction of the Act and was not prepared to run the risk of paying the money over and therefore paid the money into Court.

Held, that the company was yet liable to pay interest from 13th August, 1936, down to the date of payment into Court.

THE KING *v.* SALFORD ASSESSMENT COMMITTEE: *Ex parte* OGDEN, (1937) 2 K.B. 1.

Rating—Rating and Valuation Act, 1925—Assessment committee—Hearing objections to draft valuation lists of the rating authority—Judicial act—An officer of rating authority appointed as clerk to the assessment committee and to be present at its meetings—Objection to rating authorities' order—Hearing of—If clerk can be present at the meeting—Objection on ground of bias—Valid.

A Mr. *B* was employed by the council of the city of *S* for 34 years past and had been engaged in the administrative section of the town clerk's department. In addition to other work, he had, from January, 1935, also acted as clerk to the assessment committee for the assessment area of *S* city and in that capacity had advised the committee of the proper procedure and made the proper entries in the valuation lits of the amendments ordered by the committee, but took no part in the committee's decisions. As part of that duty of committee clerk he attended the meetings of the rating committee, to which were delegated the council's duties with respect to preparation of valuation lists for taking the minutes of their proceedings. Beyond that he took no part in advising them. Mr. *O* was the owner and co-occupier of cinemas and a billiard hall. A draft valuation list of the rating area of *S* was made by the rating

committee. Mr. *O* filed objections thereto. The matter came before the assessment committee. A resolution of the committee provided that "pending the appointment of a clerk to the committee Mr. *B* of the town clerk's department be appointed as acting clerk to the committee" and that he "remain in attendance upon the committee during the whole of the meeting". Pursuant to that Mr. *B* was at the meeting and Mr. *O* objected to his presence there and took out the application for a writ of prohibition prohibiting the committee from acting on those resolutions, as Mr. *B* was so related to the *S* rating authority, which was the party appearing against Mr. *O* on his application to amend the valuation list, as to be unfit to occupy the position of acting clerk of the committee, and that Mr. *B* may have a bias which may affect the committee's deliberations.

Held, that the assessment committee constituted under S. 17 of the Rating and Valuation Act, 1925, to hear objections made to the draft valuation list under S. 27 and finally to approve the list under S. 28 of the same Act, is a body performing judicial or *quasi*-judicial functions. Therefore the general principles affecting the possibility of bias, as exemplified in the case of justices of the peace, should be applied to an assessment committee, and that irrespective of their particular constitution. It is not only necessary that justice should be done, but that it should manifestly appear that justice is done. Mr. *O* might reasonably suppose that justice would not be done by the assessment committee when the adviser to the committee might of necessity be acquainted with the preparation for the proceedings of his opponents, the rating committee. A rule was therefore issued prohibiting the assessment committee of the city of *S* from allowing Mr. *B* to remain in attendance on the committee during the hearing of Mr. *O's* objections and proposals and during the subsequent deliberations thereof.

GREAT WESTERN RAILWAY COMPANY *v.* CHAMBER OF SHIPPING OF THE UNITED KINGDOM, (1937) 2 K. B. 30.

Railway—Railways Act, 1921, *S.* 37, *sub-Ss.* 1 *and* 2—*Application by railway company for consent of the Railway Rates Tribunal to reduce rates—Considerations to weigh with the tribunal.*

In April 1936, the G. W. Railway applied to the Railway Rates Tribunal for its consent to the granting of some concession rates, which are more than 40 per cent. below the standard rates, for the carriage of grain between certain places. The chamber of shipping objected to the grant of sanction on the ground that this traffic between the two places has hitherto been carried on by coastal carriers and that the grant of this sanction would affect members of the chamber of shipping whose vessels are employed in the coasting trade.

Held, that on an application by a railway company under S. 37 of the Railways Act to the Railway Rates Tribunal for sanction to the grant of exceptional rates, the Tribunal is not bound to consider whether the exceptional rate will prejudice coastal carriers, in the sense of placing them under a disadvantage. The tribunal is only to consider whether the exceptional rate would jeopardise the company's interests and the purposes mentioned in S. 58 of the Act, namely, (1) to obtain realisation of what in the Act is called the standard revenue and (2) to ensure that persons using or desiring to use the railways shall not be prejudiced.

MERSTHAM MANOR, LIMITED *v.* COULSDON AND PURLEY URBAN DISTRICT COUNCIL, (1937) 2 K.B. 77.

Dedication—Highway—Rights of Way Act, 1932, *S.* 1—*"Actually enjoyed by the public as of right and without interruption for a full period of* 20 *years"—Meaning of.*

Section 1 of the Rights of Way Act, 1932, provides as follows: "(1) where a way not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such way. (2) Where any such way has been enjoyed as aforesaid for a full period of 40 years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way".

A roadway which joined two highways ran across the plaintiff's estate and the plaintiff claiming it as his private property, blocked the road by erecting a fence at one end and a gateway at the other. The defendant (District Council) removed them claiming the road as a highway acquired by prescription under S. 1 of the Rights of Way Act, 1932.

Held, that the words "actually enjoyed by the public as of right" mean that he who asserts the right must establish as a matter of fact, on the one hand, the actual enjoyment of the right by the public as of right and, on the other hand, the actual suffering of the exercise of that right by the landowner for the full period of 20 years. "Enjoyed" means "having had the amenity or advantage of using". "As of right" requires that the quality of the acts, as well as the acts, must be established. The words will be satisfied if the evidence shows that the actual enjoyment has been open, not by force and not by permission from time to time given. "Without

interruption" means actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenged the public right to that enjoyment.

LEVER BROTHERS, LIMITED *v.* KNEALE AND BAGNALL, (1937) 2 K.B. 87.

Appeal—Libel action—Injunction order—Disobedience of—Committal for contempt by Judge in Chambers—Appeal to appellate Court or Divisional Court—R.S.C., O. 54, r. 23.

In an action for damages for libel and for an injunction restraining the defendants from further publishing the libels, Branson, J., decreed the suit and further granted an injunction. Finlay, J., in Chambers passed an order committing the defendant for contempt in disobeying the order of Branson, J. O. 54, r. 23 of the Rules of the Supreme Court provides that "In the King's Bench Division, except in matters of practice and procedure, the appeal from a Judge at Chambers shall be to a Divisional Court".

Held, by the Court of Appeal, that this was a matter of practice and procedure within the meaning of O. 54, r. 23 and the appeal lay to the Court of Appeal.

THE KING *v.* MANCHESTER JUSTICES: *Ex parte* LEVER, (1937) 2 K.B. 96.

Summary Jurisdiction Act, 1879, *S.* 22*—Justices—Trial for motor offence—Accused absent—Accused fined—Order not entered in the register of convictions—Information of previous convictions—Warrant to accused to appear—Trial by another Bench—Severer fine by the new Bench—If valid.*

On 20—1—1937 two summonses came before justices sitting at *M* police court charging *L* with having left a motor car without lights and unattended in a street. When the summonses were called on, the applicant was not present, though he had been served with the summons. The police let in evidence on the charge and *L* was convicted and fined 20*s.* on one and 10*s.* on the other count. Before an entry had been made in the register of convictions and orders of the Court kept under S. 22 of the Summary Jurisdiction Act, 1879, it was brought to the notice of the justices that *L* had three previous convictions for motor offences. In view of that information the justices felt that the matter should be dealt with in the presence of *L* and therefore issued a warrant for his arrest. *L* appeared but it came before a differently constituted Bench on 23—1—1937, and there he pleaded guilty. That Bench fined him 40*s.* on each count.

Held, that *L* was entitled to plead *autrefois convict* by the decision of the justices on 20—1—1937 and that the later conviction

should be quashed. After the justices on 20—1—1937 had ordered the applicant to pay certain fines, all that remained to be done in connection with their decision was for it to be formally entered in the register of convictions. It is not the entry in the register which makes or contributes to the making of the conviction. Conviction has already been made, and complete and therefore the later conviction is not sustainable. *Rex* v. *Sheridan,* (1937) 1 K.B. 223, followed.

MEDCALF AND ANOTHER *v.* STRAWBRIDGE, LIMITED, (1937) 2 K.B. 102.

Nuisance—Private road—Resolution by local authority to take over the road—Vehicle being run down the road with a skid pan on the wheel—Damage to the road—Frontagers in the road—If can maintain an action for injunction without adding the Attorney-General—Interest apart from the Public.

The two plaintiffs were two frontagers living in Cedar Avenue, a private road. Under a document, one *T* acquired a building estate. The document imposed on him certain obligations with regard to making and maintaining roads. *T* made it out into plots and sold them to different purchasers in 1920. There was entered between him and the various purchasers a deed of mutual covenant whereby each purchaser agreed to perform the stipulations in the deed, one of which was to pay the vendor *T* a reasonable proportion of the cost of maintenance of the roads. Plaintiff *M* had acquired his house from *T*. The other plaintiff *K* purchased it from another *L* but it was also subject to the restrictive covenant of *T's* deed so far as it ran with the land. In 1927 and 1930 *M* and *K* both contributed to repairs of this Avenue. In 1936, *M* and *K* objected to a horse van of the defendant being driven down the road with a skid pan on the wheel by the defendant's servant, as it tore up the surface and damaged the road. When it was not heeded to, *M* and *K* brought an action to restrain the defendant from using the road like that. In July, 1936, the local authority passed a resolution with regard to taking over of this private road. There were objections filed to the apportionment of the cost and nothing had yet been done definitely. The Attorney-General was not made a party.

Held, that so far as *K* was concerned, she did not take directly from *T* but from *L* subject to covenants running with the land, and that these covenants were not running with the land. But *M* was a direct purchaser from *T* and was bound by the covenant and therefore under a contractual obligation to bear some share of the cost of maintaining the road. But whatever that may be, both the plaintiffs were entitled to maintain this suit, because as owners of houses or premises on a private road they had a special interest in preventing damage to the road because of the possible effect on the

enjoyment and value of the houses. Further by the road being damaged, there was the danger of the council taking it over and making it at the owner's expense. These fears gave them sufficient interest differing from that of the other members of the public. A *quia timet* action can be brought in cases of nuisance if the plaintiff shows that he will sustain substantial damage by what the defendant is about to do. Here this is an illegal act, illegal in the sense that the defendant was inflicting a wholly unnecessary damage to the land and the Court would interfere in anticipation.

HOPE AND ANOTHER *v.* GREAT WESTERN RAILWAY COMPANY, (1937) 2 K.B. 130.

Practice—Suit for damages in the King's Bench Division—Judge ordering trial by Jury—If plaintiff can object—Rules of the Supreme Court, O. 36, rr. 1 to 7—Effect of.

An infant girl brought an action in the King's Bench Division against the Railway Company for damages for injuries sustained by her by the alleged negligence of the company's servants. The Master made an order that the action be tried by a Judge and special jury at the defendant's instance. The Judge in Chambers dismissed an appeal against that order of the Master. She appealed to the Court of Appeal claiming that the action should be tried by the Judge alone without a Jury.

Held, that the present rr. 1 to 7 of O. 36 of the Rules of the Supreme Court are subject to the provisions in S. 6 of the Administration of Justice (Miscellaneous Provisions) Act, 1933 and a discretion is given to the Court completely (qualified only by the specific discretion under r. 5) to decide whether it will try a suit with or without jury. The appellate court will not interfere with the exercise of that discretion.

BLAUSTEIN *v.* MALTZ, MITCHELL & COMPANY, (1937) 2 K. B. 142.

Principal and agent—Moneys of A *with* B—B *giving them to his solicitor* C *to be paid to* B's *vendor—Transaction falling through*—B *instructing* C *to get back the money*—C *receiving it back—Claim by* B *against* C—C, *if entitled to plead as* jus tertii *title of* A *to the money.*

An engagement of marriage was entered into between the plaintiff *L* and Miss *S. J.*, a daughter of Mr. *J.* The engaged parties chose a house in which to live after marriage and the plaintiff entered into an agreement to purchase it for 1,725*l.* Mr. *J.* gave a cheque for £172 and odd being the advance deposit to the plaintiff *L* as a gift conditional upon the marriage taking place. *L* paid it into his own account with his bank and gave his own cheque for the same amount to the agents of the vendor. He instructed Mr.

M, his solicitor, to act as his solicitor in this transaction. Mr. *M* was another son-in-law of Mr. *J*. The engagement was later terminated by the parties and then *L* wrote to *M* to get back the deposit amount as he did not wish to proceed with the purchase. The vendor's agents returned the deposit to *M*. Immediately *M* wrote to the plaintiff *L* that Mr. *J* had asked him to account for this money to him. But the plaintiff objected to *J* so dealing with it and filed this suit for recovering the same.

MacKinnon, J., held that on the authority of *Biddle* v. *Bond*, (1865) 6 B. & S. 225, that the defendant was entitled to set up the defence that between him and the plaintiff he is entitled to this money, inasmuch as the money belongs to *J* who has called upon him, the defendant, not to let the plaintiff have it.

Held, by the Court of Appeal (reversing Mackinnon, J.) that here the action was for an account by the principal *L* against his agent *M* and to such an action it is not open to *M* to resist the action by alleging some claim made to the moneys by some other person. *Biddle* v. *Bond* decided only that "where there is a bailment (of goods) and the bailor sues the bailee to recover the goods, or if they have been turned into money their proceeds, the bailee may, if the facts warrant it, say 'I am refusing to give these goods or the proceeds of them to you because they are not yours, but belong to a third person, and on his authority and on his instructions, I am holding them for him'. But here the relationship is not of bailor and bailee but of principal and agent and solicitor and client. The defendant as solicitor and agent was under an obligation to get back the deposit and having got it back he was under an obligation to his client, an ordinary obligation as his agent and solicitor, to return the money to him. In such cases *jus tertii* cannot be pleaded.

THE STRANNA, (1937) P. 130.

Shipping—Bills of lading—Loss of cargo—Exceptions in bills of lading in cases of perils and accidents of the sea—Cargo lost by ship taking a sudden list while loading—If saved by the exception—Cargo carried at charterer's risk—Doubtful as to how listing occurred—If owner of goods bound by the risk.

1,200 standards of timber were shipped by S.S. Stranna in good order and condition. She was lying at anchor in an open roadstead called H. C. taking on board the cargo. When about 12 standards remained to be loaded, the vessel listed to port and carried away the wooden uprights or stanchions on the port side, thereby causing lot of timber to be lost overboard. A floodtide was running at the time. The timber drifted away and was soon lost. In an action by the owner of the goods for the value of the timber lost, the shipowners relied on the exception in the bill of lading, namely, 'perils of the sea .... and all and every other dangers

and accidents of the seas .... even when occasioned by negligence, default or error in judgment of the ...... master, mariners or other servants of the owners". The bill of lading also stated that the deck cargo is to be carried at "charterer's risk".

Held, the provision to carry cargo at 'charterer's risk' would not excuse the shipowners for negligence and the pleaded facts put a duty upon them of furnishing an explanation of how the loss occurred. The loss in this case is a peril of the sea and not merely a peril on the sea. On the authorities it is clear that exceptional violence of winds and waves is not essential to a "peril of the sea" and a quiet undisturbed flow of perfectly calm water into a ship may be a peril of the sea if it enters fortuitously. This was "damage of a character to which a marine adventure is subject" and hence is covered by the exception.

Held, further (though felt unnecessary) that the words "at charterer's risk" will not avail to put upon the owner of goods, the risk of loss through unascertained causes. It may mean that the owner takes the chance of some imperfectly ascertained cause of loss. But it does not confer on the shipowners a right to claim exception from liability in every case in which the cause of the loss is unknown. That will mean that these words excuse the bailee from giving any explanation of the loss of goods.

MORTON *v.* MORTON, DALY AND MCNAUGHT, (1937) P. 151.

Divorce—Alleged adultery of wife with A *and* B *named—Evidence by wife denying adultery with* A*—No evidence by her denying adultery with* B*—If husband can cross-examine her regarding adultery with* B*—"Alleged adultery" in S.* 198 *of Judicature (Consolidation) Act,* 1925*—Meaning of.*

The parties (petitioner and first respondent) were married in 1932. The husband charged the wife with adultery with two named co-respondents *D* and *M* and with one person unknown. *M* neither entered an appearance nor filed an answer. *D* appeared and filed an answer and also gave evidence. The wife also appeared and gave evidence. With regard to *M* there was the evidence of the husband and his solicitor's clerk of an express confession by *M* of the adultery but in a charge of adultery it was not evidence against the wife, though it might be evidence against *M*. As *M* was not called there was no evidence of adultery with *M*. The husband wanted to elicit by cross-examination of the wife the adultery with *M*.

Held, it is not permissible. S. 198 of the Judicature (Consolidation) Act, 1925, provides that no witness, whether a party to the proceedings or not, shall be liable to be asked or bound to answer

any questions tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof "of the alleged adultery". It means that unless and until the wife denied the adultery with regard to which the cross-examination is to be directed there is no right to cross-examine as to that particular adultery. Here there is a general charge of adultery and a charge of adultery with *D* and another with *M*. The only evidence given by the wife was denial of adultery with *D*. She has not given any evidence re-adultery with *M* and hence there can be no cross-examination about that. "Alleged adultery" in S. 198 means adultery with the particular co-respondent.

GREENWOOD *v.* GREENWOOD, (1937) P. 157.

Divorce—Wife's petition—Husband living in adultery—Wife aware of it but conniving at it—Long delay in filing petition—If Court to grant divorce—Supreme Court of Judicature (Consolidation) Act, 1925, *S.* 178.

The parties were married in 1901 and had two children. In 1907 they entered into a deed of separation which provided for a maintenance provision of 1*l.* a week. When the husband became more prosperous, another deed was executed in 1915 providing for 10*l.* a month. Duding all this period Mr. *G* (husband) was living with the lady Miss *W* named in the petition for divorce and it was known to Mrs. *G* from the beginning. In 1920 Mrs. *G* instituted divorce proceedings against Mr. *G* on grounds of adultery and cruelty. It was filed more to get a better maintenance and it was compromised by another deed of 1921 under which she got 450*l.* a year. Her attitude towards her husband was that her husband intended to go on living with Miss *W* and she did not mind about it. In 1932 Mr. *G* resigned his office and his financial position became worse. She accepted 1,000*l.* in full quit. She invested it but the investment failed. Now she brought a petition for divorce against the husband alleging his continued adultery with Miss *W*.

Held, that the wife was guilty of unreasonable delay. The Court is not bound under S. 178 of the Judicature Act, 1925, to dismiss a petition merely because there has been a degree of delay, but the Court is not bound either to pronounce a decree if it finds that a petitioner has been guilty of delay in presenting or prosecuting the petition. After 1920 the action of Mrs. *G* was one of connivance at her husband's adultery and that barred her claim to relief. *Thomas* v. *Thomas,* (1860) 2 Sw. & Tr. 113, applied.

JOTTINGS AND CUTTINGS.

The Three Appointments.—Lord Wright was born in 1869. He was a Fellow of Trinity, 1899—1905, and called in 1900. In

1925, when he was a very distinguished leader of the Commercial Court, he was made a Judge of the King's Bench Division, and he was promoted direct to the House of Lords in 1932. He succeeded Lord Hanworth as Master of the Rolls in October, 1935. His judgments have been strong, clear, and concise—good to listen to and good to read. Sir Wilfrid Greene is fifty-three, and is, it is said, the youngest lawyer to become Master of the Rolls. He was brilliantly successful at Oxford, and his war record was good; he served on several fronts and had three years in the trenches before he became a staff officer. He had one of the largest, most exacting, and most lucrative practices at the Bar. In 1925 he was Chairman of the Committee on Company Law—"the Greene Committee" —whose recommendations resulted in the present Companies Act. Mr. Justice MacKinnon was born in 1871 and became a King's Bench Judge in 1924 in place of Mr. Justice Bailhache, and for some years he has presided over the Railway and Canal Commission.—*L.T.*, 1937, *p.* 331.

Judicial Changes.—Several judicial changes were announced at the beginning of the present week. Lord Wright, who a couple of years ago left the House of Lords to become Master of the Rolls, has again been appointed a Lord of Appeal-in-Ordinary in succession to Lord Blanesburgh, who has resigned. Sir Wilfrid Greene, a Lord Justice of Appeal, has been appointed Master of the Rolls, and Sir Frank MacKinnon, a justice of the King's Bench Division, has been appointed a Lord Justice of Appeal. All these changes are important and interesting, and the appointments have been well received by the Profession. Lord Blanesburgh has done sterling work throughout his long career. Born in 1861, he was called to the Bar in 1884, and soon acquired a very large Chancery practice. He became Mr. Robert Younger, Q.C., in 1900; a judge of the High Court in 1915; a Lord Justice of Appeal in 1919; and a Lord of Appeal-in-Ordinary in 1923. He was principal British delegate to the Reparations Commission from 1925 to 1930, and has presided over a number of Government committees, including that on Unemployment Insurance, which issued the well-remembered "Blanesburgh Report".—*L.T.*, 1937, *p.* 331.

Pronunciation in the Law.—The anomalies of English spelling and pronunciation have always proved a severe stumbling block to foreigners, who are naturally puzzled on both heads, but even to English people, who are supposed to have an intuitive familiarity with such matters as their own language, difficulties strew their path. Some proper names in particular are specially obnoxious to criticism on the ground of their pronunciation being so remote from what might be expected from the spelling. At some of these anomalies, Mark Twain, in the extravagance of his waggery poked

excellent fun as when he said that the English are a curious race, for they have a name spelt "Marjoribanks" and they pronounce it "Chumley"! But leaving aside proper names and coming to some very ordinary dictionary words we find their pronunciation governed by some mysterious power, giving them a sound quite different from what might be expected. It is true that in some special callings words acquire a meaning and sound which they do not possess outside that particular territory. In the law we have a few of these in the matter of pronunciation. For example, there is the word "marital". Only the other day, in the House of Lords, a learned counsel kept pronouncing it "ma-rital", to be eventually instructed from the Woolsack that the orthodox pronunciation is "marī-tal". Is this latter pronunciation of the word general outside the law? In the Oxford English Dictionary only the mode adopted by the learned counsel is given, but in the Concise Oxford Dictionary both pronunciations appear but what may be called the lawyers' method is given only second place. Another word much used in the courts is that applied to the person who has effected a policy of insurance and who is called the "assur-ed," with an accent of the "ed". Many in the insurance world are not a little amused by this pronunciation of a word which they pronounce as a dissyllable, not as trisyllable. Even in the memory of older people certain words even in the supposed conservative atmosphere of the courts have changed their pronunciation. For example, the word "revenue" was at one time both in Parliament and the courts pronounced with the accent on the "ven," and it used to be said that a member of the Bar who had been accustomed to the modern pronunciation of the word, deemed it expedient, on being appointed a law officer of the Crown, to adopt the older and what was regarded as the orthodox style.—*L.T.*, 1937, *p.* 343.

A Famous Lodger in the Abbey.—To take lodgings within the Abbey was a well-known euphemism for taking advantage of the sanctuary as a retreat from the too embarrassing attentions of creditors. We have seen that Sir Walter contemplated the possibility of having recourse to the Abbey precincts; but we find that a later man of literary eminence was compelled by circumstances to spend nearly five years of his life within the circumscribed area out of reach of his creditors. This was De Quincey, a perfect child in money matters or in the conduct of business of any kind. He was forced to seek the retreat which the Abbey offered in 1835, and there he remained off and on till 1840. Occasionally as a "Sunday gentleman" he would visit his friends in Edinburgh, and once at least, forgetting the passing of the time, he remained from one Sunday till the next without his creditors becoming aware of the fact. During his residence within the privileged bounds he was by no means idle, being unremitting in his contributions to *Tait's*

Magazine and *Blackwood's* which he enriched with some of his best work, so that his monetary difficulties left him apparently untroubled, equally as did those of Captain Shandon with his work as editor of the imaginary Pall Mall Gazette.—*L.T.*, 1937, *p.* 419.

Conciliation in Matrimonial Causes.—In a letter that the late Sir Frederick Pollock wrote to the *Daily Telegraph* last November, he urged that the Divorce Court should abandon its practice of treating matrimonial causes on the lines of ordinary litigation. "A court for matrimonial causes should have conciliation for its first object, should have the carriage of the cause in its own hands, and should be entrusted with wise discretion." We noticed the letter at the time (82 Law Journ., p. 362), and Mr. Claud Mullins, whose interest in the subject is well known, reproduces it in an article on "Conciliation in Divorce Cases" in the current *Fortnightly Review*. He points out that the divorce problem has always been considered mainly from the standpoint of the paying client, and for the paying client efforts at conciliation are made before the case comes into Court. The paying client, whether in matrimonial or in other matters, gets both conciliation and litigation. The poor person, says Mr. Mullins, only gets litigation, and this defect is not, he points out, remedied by the help given under the Poor Persons Rules. Magistrates are not directly concerned with divorce. Their functions in matrimonial matters are confined to the making of separation and maintenance orders and the custody of children. But here too there is need for conciliation, and Mr. Mullins gives figures showing the success with which he has employed this method in his own Court. Out of 220 matrimonial summonses issued in seven months, 108 were adjusted either before or after coming into Court; of the remaining 112, which were heard to the end, 23 were dismissed, and 89 final orders were made. As Mr. Mullins says, with extended grounds for divorce, the need for conciliation will inevitably become more acute. The Conciliation Clause which the Marriage Bill contained was abandoned in Committee, but in some form effect should be given to the principle it contained.—*L.J.*, 1937, *p.* 21.

A Free Country.—After a perusal of the daily newspaper on Monday, some of our readers may wonder whether England is really a free country. A Fascist march, we read, took place in London. It was not allowed to proceed through the streets of its own choice. It was "diverted" and controlled by the police, shepherded into a prepared open space in Trafalgar Square. There the leaders were permitted, under close police protection, to express their sentiments. Critics attended in large numbers, but the right of criticism was closely confined to the throwing of an occasional apple, the emission

of derisive sounds and the scattering of anti-Fascist literature, in an ephemeral form, in the streets. Ultimately the procession marched off the field under strict police protection to its point of disbandment. Compare these proceedings with the true liberty of Austria, which on the same day received a striking vindication at the football match between Vienna and Genoa. The umpire (with English ideas) dared to restrain the freedom of a player by awarding a penalty. The players then started a perfectly free fight. The game was frequently suspended while players wrestled with one another on the ground, fought with their fists and went about the field with bleeding noses. Everything went off quite smoothly, and in the end, as the reporter aptly observed, the game was fought to a finish and ended in angry demonstrations. In that free country no grandmotherly policemen intervened to check blows or silence verbal insults. Everybody did what he, or she, liked.—*L.J.*, 1937, *p.* 22.

Paddling Pools.—The decision of the Court of Appeal in *Ellis* v. *Fulham Borough Council* (*Times*, June 26) will, we think, commend itself to parents and children as well as to lawyers. It may be unwelcome to local authorities. Many of these bodies provide paddling pools for children in their parks, and surely there can be no more humane amenity in the crowded cities of to-day. The defendant Council, who were appellants, had such a pool and the simple story was that the plaintiff's son, a small boy, was paddling in the pool when his foot was badly cut by a piece of glass. There was ample evidence that the defendants knew of this kind of danger, though they, of course, did not know of the particular piece of glass. They had a system of raking the pool which was ineffective to meet a danger of which a notice, put up near the pool, showed that they were aware. There was some difference of opinion as to whether the injured child was an invitee or a licensee. The Judge below thought he was an invitee, but two Lords Justices disagreed with him on this point; and it is well to have that high authority upon it. The whole Court agreed, however, that, even if the child were a licensee, the defendants were liable. The duty due to licensees is well put by Lord Justice Greer in *Parkes* v. *Walthamstow Borough Council* (1934, 151 L.T. 30), where the cases are considered. It is a duty to protect against a danger which they *know* and of which the injured person does not know. Some of the cases might justify us in adding a gloss so as to read "when they know or in reason ought to know". However, that may be, the Borough Council knew enough to make them liable.—*L.J.*, 1937, *p.* 23.

Finality of House of Lords' Decisions.—In a note on the decision of the House of Lords in the recent case of *Fender* v. *Mildmay*, *The Spectator*, after alluding to the divergence of judicial opinion

on the question at issue, concluded with these words: "So Miss Fender gets her £2,000. But since five judges in all were against her and only four with her, the law on the point at issue can hardly be said to be convincingly established". Whether one agrees or disagrees with the decision ultimately arrived at, the law is certainly established and can be altered, if at all, only by the Legislature. In earlier days this doctrine was not regarded as clearly settled as it has since become. Thus Lord Eldon, when Lord Chancellor, said in one case that "a rule of law laid down by the House of Lords cannot be reversed by the Chancellor. . . The rule of law must remain till altered by the House of Lords," thus implying that the House had an inherent power to do this. Even Lord Chancellors are, however, not always consistent, for the same occupant of the woolsack, in another case, used expressions to the contrary effect. One of his successors, Lord St. Leonards, declared that the House was not bound by a rule of law, if, upon a subsequent occasion, it should find reason to differ from it, and, he added, that the House like every other court of justice, possessed an inherent right to correct an error into which it might have fallen. Lord Chancellor Campbell took the more modern view that a decision of the House could be varied or reversed only by Parliament. These conflicting dicta were brought before the House and elaborately discussed in *London Tramways Company* v. *London County Council,* (1898) A. C. 375, when Lord Halsbury, Lord Macnaghten, Lord Morris and Lord James of Hereford laid it down as clear that a decision of the House on a question of law is conclusive and binding on the House in subsequent cases, that its correctness in point of law cannot be enquired into, and that its effect cannot be got rid of save by an Act of Parliament, as was in fact done by the Statute 5 Edw. 7 c. 12, which undid in large measure the decision of the House in the Scottish church case.—*S.J.*, 1937, *p.* 577.

In Other Courts.—While normally the decisions of other courts can be corrected, if that is deemed necessary, only by a higher tribunal, the rule in this matter is not so rigid as it has been held to be in the House of Lords. As to the practice of the Judicial Committee of the Privy Council, it was laid down in *In re Transferred Civil Servants* (*Ireland*) Compensation [1929] A.C. 242, that there is no inherent incompetency in ordering a rehearing of a case already decided by the Board even when a right of property is involved, but that such an indulgence will naturally be granted only in exceptional cases. So, too, but only on rare occasions, has it happened that a point of law involved in a former decision of the Court of Appeal, constituted as it normally is of three members, has been reconsidered by a full court consisting of six members, not of course with the object of reversing the actual decision so far as the parties to it were concerned—it cannot do that—but to test

its correctness in point of law. There is something to be said for a similar practice being adopted in the House of Lords.—*S.J.*, 1937, *p.* 577.

BOOK REVIEWS.

BENTWICH PRIVY COUNCIL PRACTICE, Third edition, 1937. Price 35 *s.* net. Published by Messrs. Sweet & Maxwell, Ltd.

Bentwich's Privy Council Practice has been for several years looked upon as a leading text book on the practice of the Privy Council in judicial matters in appeals to that tribunal. This edition which appears after ten years of the prior one will be heartily welcomed by the legal profession as there has been a great change in the conditions of the jurisdiction of the Privy Council by the Statute of Westminster and the consequent legislation in some of the colonies. So far as India is concerned, the large bulk of the Privy Council appeals is contributed by this country and an up to date exposition of the practice of the Privy Council is very necessary for the lawyers and judges here. Further, the Government of India Act, 1935, has introduced important changes by the establishment of the Federal Court which may in course of time lead the legislation affecting the jurisdiction of the Privy Council. The learned author has dealt with the provisions of the Government of India Act of 1935 and the possible changes consequent on the same at pp. 80 to 82 of the book, where he winds up the history of the jurisdiction of the Privy Council in appeals from India. Now that Burma has been separated from British India, the question of appeals from Burma is dealt with separately at p. 99. Since the appearance of the last edition, several decisions on points of practice have been given and they have been noticed in the book. We have therefore no doubt in saying that this edition of the book will be found to be of great assistance to the lawyers and judges in this country and will be widely used to them.